

# **EXHIBIT 4**

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF TEXAS  
AUSTIN DIVISION

IN RE:	)	CASE NO: 16-10020-TMD
	)	CHAPTER 11
	)	
FPMC AUSTIN REALTY PARTNERS, LP,	)	Austin, Texas
	)	
	)	Thursday, May 30, 2019
<u>Debtor.</u>	)	11:00 a.m.

ORAL RULING (HELD TELEPHONICALLY)

RE: 311 MOTION FOR ORDER TO SHOW CAUSE  
FOR INTERESTED PARTY HOWARD MARC SPECTOR

BEFORE THE HONORABLE TONY M. DAVIS,  
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES: NONE MADE

Court Reporter: Recorded; Digital

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1                   Austin, Texas; Thursday, May 30, 2019; 11:00 a.m.

2                   (Call to Order)

3                   **THE COURT:** Please be seated. *FPMC Austin Realty*  
4 *Partners, LP*, 16-10020. This is my oral ruling.

5                   I've reviewed my prior ruling on the substantial  
6 contribution claim, took judicial notice of the plan and  
7 confirmation order. I have considered the testimony and  
8 exhibits at the evidentiary hearing held on October 3rd, 2018.  
9 I have read and reread that transcript many times as well as  
10 the transcript from the substantial contribution hearing. I've  
11 also read the briefs filed by the parties except that I have  
12 not considered the additional evidence the receiver asked me to  
13 reopen the record to consider for reasons previously discussed.

14                   This ruling comes in three parts.

15                   Part 1. As I have said, I have gone back and forth  
16 on the alleged misrepresentation. The consents were not hidden  
17 at the substantial contribution hearing but were very much a  
18 part of it. They were in the record. So, when Mr. Furniss  
19 testified, it was in the context with the consents which we all  
20 assumed would allow GTC to collect money if the substantial  
21 contribution claims were not allowed. The infirmities with the  
22 consents as alleged by the receiver were not at issue at the  
23 time.

24                   Therefore, I believe and find that when Mr. Furniss  
25 said, "And glendonTodd didn't get any of that", he meant under

1 the waterfall established by the partnership agreement and no  
2 more. He was trying to make clear that GTC did not hold any  
3 equity and therefore did not get anything as an equity holder;  
4 and he could say that much completely consistent with his view  
5 that the consents were a valid avenue payment.

6 That's what I heard and that's what I took him to  
7 mean as I looked back at the transcript and the context around  
8 that statement. So there was no misrepresentation nor do I  
9 find that there is sufficient evidence that the other  
10 statements by the receiver were misrepresentations.

11 Part 2. There is no State Court final order on the  
12 two payments totaling the amount of the substantial  
13 contribution request for \$2.875 million, and so I abate as to  
14 those transfers. I'm not ruling one way or the other for the  
15 reasons stated a few weeks ago. And if there is a final order  
16 from the State Court and either side sees the need to reopen,  
17 I'll do so.

18 There is a final order on the payment of \$1.150  
19 million. The State Court ruled that Mr. Furniss breached his  
20 fiduciary duty to NRG Austin, the GP, by making this transfer  
21 and that Mr. Furniss "had no legal right" to make this  
22 transfer.

23 Mr. Furniss and GTC also breached the fiduciary duty  
24 they owed to the GP under bankruptcy law and violated the  
25 confirmation order at Section 3(b) ordering clause, Page 11,

1 which requires agents and representatives of the Debtor and the  
2 Reorganized Debtor to "Carry out all provisions of the plan".

3 On Page 11 of the plan, the plan states that "The  
4 Class 5 allowed interest of the FPMC equity holders shall  
5 retain the respective allowed interest in the Reorganized  
6 Debtor and shall receive distributions in accordance with the  
7 partnership agreement after the payment of all other allowed  
8 claims".

9 I find that those respective allowed interests, and  
10 in particular the GP, did not receive distributions in  
11 accordance with the partnership agreement because of the \$1.15  
12 million transfer to GTC, and so the plan and confirmation order  
13 were both violated, and Mr. Furniss and GTC knew these actions  
14 violated the plan and the confirmation order.

15 As to the why, one need look no further than the  
16 letter drafted and signed by Mr. Furniss, GTC Exhibit 5, which  
17 shows why people were anxious to get this money to GTC.  
18 Significantly, the letter discloses that GTC was in debt to  
19 Jefe Plover (phonetic), Dr. Barker's entity, in the amount of  
20 \$1.6 million lending some urgency to GTC's need to get its  
21 hands on some money.

22 Actually, many nests were feathered in this  
23 arrangement. The letter makes reference to "A number of  
24 obligations each of us has"; the big one is Jefe Plover owned  
25 by Dr. Barker, and GTC gets the benefit of that loan being

1 repaid which in turn benefits Mr. Furniss, Ms. Hatcher  
2 (phonetic), and Dr. Barker. Mr. Furniss's wife gets repaid and  
3 GTC also would benefit from a proposed \$25,000 a month payment.

4 I have heard many times from Mr. Furniss and from his  
5 lawyers statements to the effect that certain members of the GP  
6 were either in jail or under indictment, or that allowing them  
7 to collect the money owed and "promote" would violate federal  
8 law. I have seen no motions or briefing on this point nor did  
9 anyone object to their interest in the bankruptcy case or  
10 object to getting the distributions that they were entitled to  
11 under the plan.

12 This breach of fiduciary duty by Mr. Furniss and GTC  
13 is bad faith conduct. Clearly, a Bankruptcy Court when given  
14 evidence that fiduciaries under a plan of reorganization have  
15 violated their duties to case constituents by misappropriating  
16 the money to be distributed under a plan, the Bankruptcy Court  
17 must take action and impose appropriate sanctions.

18 I have been given that evidence and it is clear and  
19 convincing. Under Section 105, "The Court may issue any order  
20 of process or judgment that is necessary or appropriate to  
21 carry out the provisions of this title". It further states  
22 that the Court may take "Any action or make any determination  
23 necessary or appropriate to enforce or implement Court orders  
24 or rules or to prevent an abuse of process".

25 I don't think there can be any doubt that knowingly

1 violating a plan for personal benefit is an abuse of process or  
2 that Section 105 extends to plan violations and violations of a  
3 confirmation order.

4 And I would cite Terrebonne Fuel and Lube, 108 F.3d  
5 609, from the Fifth Circuit, two bankruptcy opinions from the  
6 Southern District of Texas, In Re Rodriguez, 396 B.R. 436 and  
7 In Re Sanchez, 372 B.R. 289, and finally, a case from the  
8 Bankruptcy Court for the Western District of North Carolina,  
9 Tate, 253 B.R. 653.

10 GTC has made the superficially logical argument that  
11 this is a matter between the GP of the Debtor and members of  
12 the GP, but the fact remains that not even the GP received the  
13 money, and the plan and confirmation were a call for GP to  
14 receive that distribution.

15 As noted previously, I have the power to compensate  
16 and coerce, but not punish. As a coercive sanction, I order  
17 GTC and Mr. Furniss to pay the receiver \$115,000 unless the  
18 awards made by the State Court of \$1.150 million and attorneys'  
19 fees are paid by September 21, 2019. The award will increase  
20 by \$115,000 every four months thereafter that the State Court  
21 awards are not paid. The sanction again will not be imposed  
22 if the State Court awards are paid in full before September 21,  
23 '19.

24 I will also, as a compensating sanction, award the  
25 receiver attorneys' fees and costs, but with caveats. First, I



1 will not allow duplicate fees, meaning I will not award fees  
2 already awarded by the State Court. In other words, I will  
3 only award those fees incurred in handling this matter here in  
4 Bankruptcy Court and the Federal District Court appeal, and  
5 only if they are not already covered by the State Court  
6 judgment.

7           Second, I will award only that portion of fees that  
8 corresponds to the ratio of \$1.150 million to \$4.25 million.  
9 Whether an additional award is appropriate based on the  
10 ultimate State Court disposition awaits that disposition.

11           If the receiver intends to seek fees and costs as  
12 just outlined, the receiver must do so by June 14. Any  
13 objection to those fees must be filed by June 28.

14           All of this will be incorporated in a separate order  
15 that will follow.

16           We are adjourned.

17           **(This proceeding was adjourned at 11:08 a.m.)**

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CERTIFICATION

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

A handwritten signature in cursive script, appearing to read "Toni Hudson", is positioned above a horizontal line.

June 7, 2019

TONI HUDSON, TRANSCRIBER